Supreme Judicial Court of Massachusetts.

ROGERS, PER PRO. AMI, *v.* LUDLOW MANUFACTURING COMPANY.

In an action against a manufacturing corporation for injuries received by an employee by reason of a defect in the machine on which he was employed, a request to instruct the jury "that the making of such ordinary repairs as the machine requires, and the keeping of it in order, from day to day, may be intrusted to servants; and if the master employs competent servants for that purpose, and supplies them with suitable means, the master performs his duty," is rightly refused, where there is evidence that the servants employed to repair the machine did not use due care in their repairs, or in giving warning of danger. In such a case it should be submitted to the jury whether the defendant had exercised a reasonable supervision over its servants, and over the manner in which the machinery was kept in repair.

TORT by an employee against the defendant corporation, the master, to recover damages for an injury received by the plaintiff while in said employ. The first count charged that the injury was caused by the failure of the defendant to provide suitable and safe machinery; the second, by the failure to give plaintiff suitable instructions and proper warnings of danger. At the trial in the superior court, before ROCKWELL, J., the jury found for the plaintiff, and the defendant alleged exceptions. The material facts appear in the opinion.

George M. Stearns, for defendant.

G. Wells and *J. B. Carroll*, for plaintiff.

The opinion of the court was delivered by

FIELD, J.—As we construe the charge of the presiding judge, and as we think it must have been understood by the jury, we find nothing in the exceptions that requires comment except the refusal to give the third instruction requested, and the instructions given in place of it. That request was: "That the making of such ordinary repairs as the machine requires, and the keeping of it in order from day to day, may be intrusted to servants; and if the master employs competent servants for that purpose, and supplies them with suitable means, the master performs his duty." This request was taken from the opinion in *McGee* v. *Boston Cordage Co.*, 139 Mass. 445, 448, 1 N. E. Rep. 745, with a slight change. In that opinion it was said "that the making of such ordinary repairs as the use of the machine required to keep it in order from day to day

may be intrusted to servants." The request includes all ordinary repairs which the machine requires, as well as those required to keep it in order from day to day. Since the law was established in *Farwell* v. *Boston and W. R. Corp.*, 4 Metc. 49, that a master is not liable for an injury to a servant caused by the negligence of a fellow-servant, because every servant takes, by virtue of his employment, the risk of such an injury, the question has been much discussed how far a master can escape responsibility by delegating the management of his business to servants. In that case it was said that "we are far from intending to say that there are no implied warranties and undertakings arising out of the relation of master and servant. Whether, for instance, the employer would be responsible to an engineer for a loss arising from a defective or ill-constructed steam-engine; whether this would depend upon an implied warranty of its goodness and sufficiency, or upon the fact of wilful misconduct or gross negligence on the part of the employer if a natural person, or of the superintendent or immediate representative and managing agent in case of an incorporated company,—are questions on which we give no opinion." Since that decision it has been established that it is the duty of the master to take reasonable care that suitable machinery be provided, that it be kept in proper repair, and that competent servants be employed and retained."

As a corporation must act by natural persons, and as all large corporations carry on their business by means of servants of different grades, it is manifest that if it is held that these are all fellow-servants, and that the corporation can delegate the whole duty of hiring and superintending its servants, and of providing its machinery, and of keeping it in repair, to one or more principal servants, such as superintendents or managers, the corporation may escape all responsibility for injuries caused by defective machinery, except in the few cases where it can be shown that these principal servants were incompetent, or that the directors of the corporation or its principal officers knew that the subordinate servants were incompetent, or that the machinery used was defective. To avoid this result some courts have held that superintendents or managers were not fellow-servants with the men employed to work under them, or that servants employed in one department of the business were not fellow-servants with those employed in another. Other courts have held that they were all fellow-servants, but that the master cannot avoid his obligation to see to it that reasonable care

shall be exercised in procuring suitable machinery, in keeping it in repair, and in hiring and in retaining competent servants, by employing a servant to do these things for him; and that if he does employ a servant for this purpose, and the servant does not use due care, the master is responsible.

The tendency of the English courts, before the passage of the Employers' Liability Act (43 & 44 Vict. c. 42), was to restrict very much the liability of the master. In *Wilson* v. *Merry*, L. R., 1 Sc. & Div. 326–332, it was said by Lord Chancellor CAIRNS that "what the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select some proper and competent person to do so, and to furnish them with adequate materials and resources for the work. When he has done this, he has, in my opinion, done all that he is bound to do." Such a rule makes the liability of the master depend largely upon the extent of the supervision which he has undertaken personally to exercise over his business, and recognises few duties except those which the master has personally undertaken to perform.

The rule of *respondeat superior*, as applied to cases like the present, the exception of injuries caused by the negligence of a fellow-servant, and the limitation of this exception, have been established by courts, upon considerations of public policy, as well as of legal principle which govern cases somewhat analogous. If a master who takes no personal part in the management of his business has any duty to perform towards his servants, it is difficult to say that it is always wholly performed by doing two things, namely, by employing competent servants, and by furnishing ample means. In order that the business may be properly managed, the servants should not only be competent, but they should be numerous enough to do, and they should have the means of doing, whatever ought reasonably to be done, and such regulations should be established as to insure the requisite subordination and control, and reasonable intelligence and care, in the conduct of the business; and it is almost as difficult to define all the duties of the master in these respects as to define the duties of a person under other relations. It is not the absolute duty of the master to furnish suitable machinery; and if he is not held to warrant that the servants he employs to furnish machinery, or to keep it in repair, shall always use reasonable care, then the duty of a master who does not personally conduct his business, if

he is under any duty, we think must be to use reasonable care in the management, and that is to exercise, or have exercised, a reasonable supervision over the conduct of his servants, as well as to use reasonable care in seeing that his servants are competent, and furnished with suitable means for carrying on the business.

It is settled in this commonwealth that all servants employed by the same master in a common service are fellow-servants, whatever may be their grade or rank: *Albro* v. *Agawam Canal Co.*, 6 Cush. 75; *O'Connor* v. *Roberts*, 120 Mass. 227; *Walker* v. *Boston & M. Rd.*, 128 Id. 8; *Holden* v. *Fitchburg Rd.*, 129 Id. 268; *McDermott* v. *Boston*, 133 Id. 349; *Flynn* v. *Salem*, 134 Id. 351; *Mackin* v. *Boston & A. Rd.*, 135 Id. 207. It is also settled that the master is only bound to use reasonable care in procuring suitable machines, in keeping them in proper repair, and in hiring and retaining competent servants. The difficult question is, what conduct on the part of the master satisfies this obligation. This question was carefully considered in *Holden* v. *Fitchburg Rd.*, *supra*. It is there said that the master "is bound to use reasonable care in selecting his servants, and in keeping the engines with which, and the buildings, places, and structures in, upon, or over which, his business is carried on, in a fit and safe condition, and is liable to any of his servants for injuries suffered by them by reason of his negligence in this respect. * * * It is difficult, if not impossible, to lay down a more definite rule applicable to all cases. As to switches or turntables upon the line of a railroad, the employment of suitable persons to select, construct, or inspect, has been held to satisfy the obligation of the corporation. * * * On the other hand, where a locomotive engine in actual use is imperfectly constructed, or is worn out, it has been held that the fact that the corporation has employed suitable persons to construct it, or to keep it in repair, does not, as matter of law, afford a conclusive defence, but the question is whether, under all these circumstances, the corporation, acting by its appropriate officers or agents, has used that diligence, and has taken those precautions, which its duty as master requires." In that case it was held that there was no evidence that the corporation was negligent, even if its servants were negligent, in setting up or using a derrick, but that there was evidence of negligence on the part of the corporation in permitting the derrick to remain for at least ten days by the side of the track.

In *Johnson* v. *Boston Tow-boat Co.*, 135 Mass. 209, and in *Elmer*

v. *Locke*, Id. 576, many of the cases were reviewed, and the general principle declared in *Holden* v. *Fitchburg Rd.*, was so applied that in one case the corporation was found not to be liable, and in the other to be liable to its servants.

In *Lawless* v. *Connecticut River Rd.*, 136 Mass. 1, it was held that it was the defendant's duty to furnish a suitable locomotive, and that "it did not necessarily discharge this duty by intrusting it to suitable servants and agents, but was responsible for the negligence or want of ordinary care of such servants and agents in the performance of the duty required of them."

In *Spicer* v. *South Boston Iron Co.*, 138 Mass. 426, the plaintiff, a servant of the defendant, was injured by the breaking of a hook, and there was evidence that there was a visible crack or flaw in the hook which a careful inspection would have revealed, and it was held that there was evidence of negligence on the part of the defendant corporation.

In *McGee* v. *Boston Cordage Co.*, *ubi supra*, there was no evidence that the machine was not a suitable one, or in good repair, until it became entangled with hemp at the time the plaintiff was using it, and the necessity of remedying this was incidental to the use of the machine.

These decisions show that it is the duty of the master to exercise a reasonable supervision over the condition in which the machinery, structures and other appliances used in his business are kept by his servants, and that he cannot wholly escape responsibility by delegating the performance of this duty to servants; that the negligence of his servants in repairing or in failing to repair machinery is not necessarily the negligence of the master, but that it is also to be determined, in each case, whether the master has exercised a reasonable supervision over his servants, and reasonable care in seeing that his machinery is kept in proper condition, although he may have employed competent servants, and furnished them with suitable materials, and instructed them to keep the machinery in repair. As was said in *Johnson* v. *Boston Tow-boat Co.*, *supra*, p. 215: "The master is liable in all cases for his own negligence, and that may be shown by a defect of such a nature, or so long continued, as to be of itself evidence of negligence in the master, or the negligence of a servant may be of such a character that negligence of the master may be inferred from it." We are aware that this rule is somewhat indefinite, and is, perhaps, not precisely the law as it

is generally declared in the United States: *Northern Pac. Rd.* v. *Herbert*, 116 U. S. 642, 6 Sup. Ct. Rep. 590; *Benzing* v. *Steinway*, 101 N. Y. 547, 5 N. E. Rep. 449.

There was evidence in the case at bar that the "worker," at the time the plaintiff was set to work upon it, had been for a long time in a condition which made it dangerous to one picking it while in motion. To put the "worker" into a safe condition to be picked while in motion it was necessary to take off the lags which were broken, or had cracks or holes in them, and to screw on new lags. The danger was that, if there were cracks or holes in the lags, the pick might get caught, and the hand of the person picking might be drawn between the rollers. The defendant's servants whose duty it was to keep the machine in repair apparently only renewed the lags when the teeth were so far broken or bent that the machine did not do good work, and did not consider that the danger of picking the "worker," if there were holes or cracks in the lags, was a reason why new lags should be put on. The court could not properly give the instruction requested in a case where the evidence tended to show a long-continued defect in the machine, which rendered it dangerous, and a habit on the part of the defendant's servants to renew the lags only when the machine ceased to do good work, and without regard to its condition as a dangerous machine. It was a question for the jury whether the defendant used reasonable care in supervising its servants who were employed to repair the machine, and in ascertaining the condition in which its machinery was kept, as well as whether these servants used due care in inspecting the machine from time to time, and in repairing it, or in giving persons using it warning of danger if the condition of the machine made it dangerous. If these servants used all the care that was reasonably required in keeping the machine in proper condition, the defendant is not liable, unless it knew of the defect, and unreasonably neglected to remedy it, or to give notice of the danger. If these servants did not use all the care that was reasonably required, it was for the jury to say whether the defendant had exercised a reasonable supervision over its servants, and over the manner in which the machinery was kept in repair.

We think that the instructions given by the presiding justice were substantially in accordance with this view of the law. The sentence that "it must appear that all these have done their duty," may fairly be taken to mean that either the servants must have used due

care in keeping the machine in repair, or, if they did not, that reasonable care must have been used in supervising them, and the condition in which the machinery was kept. This illustration was not given with reference to the burden of proof, and the only exceptions are "to the instructions given so far as they failed to comply with said requests, or were inconsistent therewith." As the third instruction requested, upon the facts in evidence, ought not to have been given without some modification, and as the attention of the presiding justice was not called to particular phrases, and the general tenor of his charge was not misleading, the entry must be, exceptions overruled.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF ARKANSAS.[1]

SUPREME COURT OF DELAWARE.[2]

SUPREME COURT OF ILLINOIS.[3]

SUPREME COURT OF IOWA.[4]

SUPREME COURT OF JUDICATURE OF INDIANA.[5]

COURT OF APPEALS OF KENTUCKY.[6]

COURT OF APPEALS OF MARYLAND.[7]

SUPREME JUDICIAL COURT OF MASSACHUSETTS.[8]

SUPREME COURT OF MICHIGAN.[9]

SUPREME COURT OF MISSOURI.[10]

COURT OF CHANCERY OF NEW JERSEY.[11]

COURT OF APPEALS OF NEW YORK.[12]

SUPREME COURT OF OREGON.[13]

SUPREME COURT OF SOUTH CAROLINA.[14]

SUPREME COURT OF TEXAS.[15]

SUPREME COURT OF APPEALS OF VIRGINIA.[16]

SUPREME COURT OF WISCONSIN.[17]

ACCRETIONS. See *Waters and Watercourses.*

BANKS AND BANKING.

Action for Deposit—Opinion of Cashier.—In an action to recover the sum of $550, alleged by plaintiff to be the balance due on certain de-

1 To appear in 46 or 47 Ark. Rep.
2 To appear in 6 or 7 Houston.
3 To appear in 118 or 119 Ill. Rep.
4 To appear in 69 or 70 Iowa Rep.
5 To appear in 109 or 110 Ind. Rep.
6 To appear in 83 or 84 Ky. Rep.
7 To appear in 66 or 67 Md. Rep.
8 To appear in 143 or 144 Mass. Rep.
9 To appear in 59 or 60 Mich. Rep.
10 To appear in 88 or 89 Mo. Rep.
11 To appear in 42 or 43 N. J. Eq. Rep.
12 To appear in 103 or 104 N. Y. Rep.
13 To appear in 14 or 15 Or. Rep.
14 To appear in 24 or 25 S. C. Rep.
15 To appear in 65 or 66 Tex. Rep.
16 To appear in 81 or 82 Va. Rep.
17 To appear in 67 or 68 Wis. Rep.